

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CHRISTIE BOWERS,)	Case No.: C08-1768RSM
)	
Plaintiff,)	DEFENDANT'S MOTION FOR
)	SUMMARY JUDGMENT
vs.)	
ROBIN KLETKE and ROBIN COHEN,)	NOTE ON MOTION DOCKET:
husband and wife and the marital community)	AUGUST 20, 2010
composed thereof,)	
<i>Pro Se</i> Defendants)	

INTRODUCTION AND RELIEF REQUESTED

Defendants Robin Kletke and Robin Cohen, pursuant to Fed.R.Civ.P 56, file this Motion for Summary Judgment. With this motion, Defendants move the court to dismiss all claims against them. Plaintiff, Christie Bowers, brought three claims for relief against the Defendants under the following statutes (Dkt #1): Federal Wiretap Act (18 U.S.C 119 § 2520), Washington State Wiretap (RCW 9.73.030), and Washington Privacy Act (RCW 9.73.060).

Plaintiff alleges that Defendants intercepted and viewed her electronic communications and disclosed the contents of those electronic communications to third parties. In over a year and a half of discovery, after numerous court orders and sanctions, Plaintiff has failed to show any evidence of interception, recording, or disclosure of her emails. Also, the dispositive case law in the Ninth Circuit holds that the alleged access to Plaintiff's email and email account is not classified as an "interception" and therefore is not applicable to Wiretap laws.

1 The material facts regarding these claims are not in dispute and case law in the Ninth Circuit
2 indicates no violation of any Wiretap law. Therefore Defendants are entitled to summary
3 judgment as a matter of law.

4
5 STATEMENT OF MATERIAL FACTS

6 The Plaintiff specifically alleged that Juno.com would provide records of the interception and
7 viewing of emails from her Juno.com email account (DKT #1 § 3.7). Plaintiff also alleged that
8 Defendants gained access and viewed emails with specific contents (DKT #1 § 3.11) and that
9 Defendants disclosed the contents of Plaintiff's emails to third parties (DKT #1 § 6.2).

10 The record in this case has mainly dealt with Defendant's attempts to procure relevant
11 discovery responses from the Plaintiff pertaining to the allegations in the complaint. However,
12 in over 18 months of discovery, the Plaintiff has not produced material evidence necessary to
13 show a violation of the statutes indicated in her complaint. Specifically:

- 14 1. There is no evidence that the Defendants intercepted any of the Plaintiff's electronic
15 communications.
16 2. There is no evidence that the Defendants recorded any of the Plaintiff's electronic
17 communications.
18 3. There is no evidence that the Defendants disclosed the contents of any of the
19 Plaintiff's electronic communications to third parties.

20
21 AUTHORITY FOR SUMMARY JUDGMENT

22 Summary judgment is proper where the pleadings and supporting material "show that there is
23 no genuine issue as to any material fact and that the moving party is entitled to judgment as a
24 matter of law." Fed.R.Civ.P. 56(c). All reasonable factual differences must be drawn in favor of
25 the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

1 The moving party needs only show the absence of material fact. In this case, Defendants are
 2 not required to prove a negative – namely that evidence of interception and recording does not
 3 exist. As the US Supreme Court held:

4
 5 “In our view, the plain language of Rule 56(c) mandates the entry of summary judgment,
 6 after adequate time for discovery and upon motion, against a party who fails to make a
 7 showing sufficient to establish the existence of an element essential to that party's case,
 8 and on which that party will bear the burden of proof at trial. In such a situation, there can
 9 be "no genuine issue as to any material fact," since a complete failure of proof concerning
 10 an essential element of the nonmoving party's case necessarily renders all other facts
 11 immaterial. The moving party is "entitled to a judgment as a matter of law" because the
 12 nonmoving party has failed to make a sufficient showing on an essential element of her
 13 case with respect to which she has the burden of proof.” *Celotex Corp. v. Catrett*, 477
 14 U.S. 317, 323 (1986).

15 In response to the supported motion, the adverse party may not rest on its mere allegations or
 16 denials, but must instead "set forth specific facts showing that there is a genuine issue for trial."
 17 Fed.R.Civ.P. 56(e). However, not every disputed fact will preclude summary judgment. "Only
 18 disputes over facts that might affect the outcome of the suit under the governing law will
 19 properly preclude summary judgment." *Anderson*, 477 U.S. at 248.

20 ARGUMENT

21 I. The Court should grant Defendant's motion for Summary Judgment on Plaintiff's First Cause of Action because there is no evidence of interception of any electronic communication.

22 Plaintiff's First Cause of Action (DKT #1 § IV) alleges violation of the Electronic
 23 Communications Privacy Act (ECPA) – 18 USC Chapter 119 (The Wiretap Act). The Wiretap
 24 Act authorizes suit against anyone who “intentionally intercept[] ... any wire, oral, or electronic
 25 communication.” 18 U.S.C §§ 2511(1)(a), 2520(a). See *Theofel v. Farey-Jones*, 359 F. 3d 1066
 26 at 1077 (9th Cir. 2004).

In the Ninth Circuit, the dispositive ruling on the Wiretap Act is *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir.2002). Quoting *Theofel at 1077-1078* “[T]he Act applies only to
 "acquisition contemporaneous with transmission." *Id.* at 878. Specifically, "Congress did not

1 intend for "intercept" to apply to "electronic communications" when those communications are
2 in "electronic storage." "" *Id.* at 877 (quoting *Steve Jackson Games*, 36 F.3d at 462). *Konop* is
3 dispositive, and the district court correctly dismissed the claim."

4 Plaintiff asserts that Defendants accessed her Juno.com email account and intercepted and
5 viewed her emails in violation of the Wiretap Act. The Ninth Circuit has determined that emails
6 residing on an Internet Service Provider (ISP) are in electronic storage, see *Theofel* at 1077.
7 Therefore, even if the allegations of access to plaintiff's emails were taken in the light most
8 favorable to the Plaintiff, such access is not a violation of the Wiretap Act.

9 Additionally, to be an interception, the acquisition of the electronic communication must be
10 of the *contents* of the communication. 18 U.S.C 2510(4). See definition of contents in the act.
11 Congress amended the definition in 1986 to distinguish between the substance, purport or
12 meaning of the communication and the *existence of the communication or transactional records*
13 *about it*. See Senate Report 99-541.

14 Plaintiff has not shown any evidence of the contents of any electronic communication that
15 she feels has been intercepted. Actually, Plaintiff's attorney, Mr. Cavagnaro, states in his
16 "Declaration of Gregory P. Cavagnaro In Opposition to Defendant's Motion for Monetary
17 Sanctions" (DKT #75, pg 5, lines 10-14):

18 "I also informed Mr. Murphy, consistent with Ms. Bowers responses that she was not in
19 possession of particular emails viewed in secret by the Defendants. I explained to him
20 that although we could identify the time and date of unauthorized access by the
21 defendants, the particular emails contained in Ms. Bowers email in-box were not
22 identifiable."

23 Plaintiff's new counsel, Mr. Walters, reiterated Mr. Cavagnaro's statements concerning the
24 inability to identify any emails that had allegedly been viewed. See Exhibit A - "Declaration of
25 Defendants in Support of Defendants's opposition to Withdraw Mr. Cavagnaro" (DKT #70,
26 Exhibit A – Email from Mr. Walters to Defendants):

"I am also aware that you asked for copies of Ms. Bowers' emails that you viewed, and
that you believe this is outstanding. I explained to Mr. Murphy that we have no way of

identifying which of Ms. Bowers' email messages that the two of you accessed and viewed so we cannot possibly produce them."

Plaintiff has not produced any "contents" of allegedly intercepted electronic communications and has not produced any evidence of "interception" of any electronic communications.

Even if Plaintiff's allegations of access are viewed in the light most favorable to the Plaintiff, those accesses would not be *interception of contents* and therefore not a violation of 18 U.S.C 119. The Plaintiff's First Cause of Action should be dismissed as a matter of law.

II. The Court should grant Defendant's motion for Summary Judgment on Plaintiff's Second Cause of Action because there is no evidence of interception or recording of any private communication.

Plaintiff's Second Cause of Action (DKT #1 § IV) claims a violation of RCW 9.73.030 for "Defendant's intentional and repeated unauthorized access to plaintiffs email(s) and email account". RCW 9.73.030 states:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

A violation of RCW 9.73.030 requires either interception or recording of a private communication (electronic communication in this case) by a device. Here, the Plaintiff has not shown any evidence that any communication was intercepted or recorded. The Plaintiff has also not shown or identified any communications that would classify as a "private communication". In fact, Plaintiff has clearly stated that she does not possess and cannot identify any particular emails in question, see Declaration of Mr. Cavagnaro (DKT #75, pg 5) and email from Mr. Walters (DKT #70, Exhibit A).

In order to show a violation, Plaintiff must first show a communication and that it was private. She has failed to produce any such communications. She would then have to show

1 evidence of actual interception or recording of a “communication transmitted by...other device
2 ...” by a device. She has failed to produce any evidence of interception or recording.

3 Plaintiff has alleged access to her email and email account. Even if those allegations are
4 viewed in the light most favorable to the Plaintiff, they do not constitute interception or
5 recording and accesses do not themselves identify any private communications. Plaintiff has
6 failed to produce any evidence of interception or recording of any private communication and the
7 Plaintiff’s Second Cause of Action should be dismissed as a matter of law.

8
9 III. The Court should grant Defendant’s motion for Summary Judgment on Plaintiff’s Third
10 Cause of Action because there is no evidence of disclosure to any third parties and
11 because disclosure is not a violation of the Washington Privacy Act.

12 Plaintiff’s Third Cause of Action (DKT #1 § VI) claims a violation of Right of Privacy by
13 disclosing the contents of private email communications to third parties. The applicable state
14 statute is RCW 9.73.060 and it states:

15 Any person who, directly or by means of a detective agency or any other agent, violates
16 the provisions of this chapter shall be subject to legal action for damages, to be brought
17 by any other person claiming that a violation of this statute has injured his business, his
18 person, or his reputation. A person so injured shall be entitled to actual damages,
19 including mental pain and suffering endured by him on account of violation of the
20 provisions of this chapter, or liquidated damages computed at the rate of one hundred
21 dollars a day for each day of violation, not to exceed one thousand dollars, and a
22 reasonable attorney's fee and other costs of litigation.

23 Because Plaintiff has not shown any interception or recording of any private communication,
24 there has been no violation of RCW chapter 9.73. Therefore, there is no civil action allowed
25 under RCW 9.73.060.

26 Plaintiff also claims that the “disclosure” of private email communications to third parties is
a violation of RCW 9.73.060. The statute does not, however, prohibit the dissemination or
divulgence of the recorded conversations. *See Kearney v. Kearney, 974 P. 2d 872 at 876 - Wash:*
Court of Appeals, Div. 2 1999.

1 Because Plaintiff cannot show a violation of RCW 9.73 for intercepting or recording any
2 private communication, and because disclosure of private communications is not a violation, the
3 Plaintiff's Third Cause of Action should be dismissed as a matter of law.

4
5 IV. The Court should grant Defendant's motion for Summary Judgment on all claims because
6 even if true, the alleged actions do not constitute a violation of Federal or State Wiretap
7 Laws

8 Plaintiff alleges that Defendants accessed her Juno.com email account. She then attempts to
9 categorize those alleged accesses as "interceptions" in violation of Federal and State Wiretap
10 Acts. The Ninth Circuit has held that an interception must be contemporaneous with
11 transmission. In fact the Ninth Circuit has held that interception is acquisition simultaneous with
12 the original transmission of the communication, *see Konop at 877*. *Konop* and *Theofel* were
13 established as the dispositive rulings in the Ninth Circuit well before this lawsuit was filed.

14 Also, a clear reading of RCW 9.73.030 shows a violation if a "private communication
15 transmitted" is intercepted or recorded. This closely matches the meaning of the Federal Wiretap
16 Act and would require interception or recording of the transmission of a private communication.
17 Therefore, access to emails on a Juno.com ISP would not violate Federal or Washington State
18 wiretap statutes (18 U.S.C. 119 § 2520, RCW 9.73.030).

19 It is also clear that disclosure of emails does not violate the Washington State Privacy (RCW
20 9.73.060) law, *See Kearney v. Kearney*.

21 Even if viewed in the light most favorable to the Plaintiff, the alleged access, by definition,
22 never met the requirements of either the Federal or Washington State Wiretap statutes, and
23 disclosure does not violate the Washington State Privacy law. Since there are no violations, all
24 claims should be dismissed as a matter of law.
25
26

CONCLUSION

This lawsuit was brought by Plaintiff because she felt that Defendants had intercepted, viewed, and disclosed information from emails in her Juno.com email account. Plaintiff sued under Federal Wiretap, Washington State Wiretap, and Washington State Privacy laws.

However, after 18 months of discovery and numerous court orders to produce evidence, Plaintiff has failed to show any evidence of interception, recording, or disclosure of any protected communications as required by the various statutes in question. Likewise, Plaintiff has failed to produce any actual communications and has indicated that she cannot identify any particular email that has been accessed. Furthermore, even if the allegations are viewed in the light most favorable to the Plaintiff, those allegations do not indicate a violation of Federal or Washington State Wiretap Laws as held by *Konop* and *Theofel*.

Without evidence of interception or recording of the transfer of communications, Plaintiff has failed “to make a showing sufficient to establish the existence of an element essential to that party's case”, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[S]ince a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial”, *Id.* the Defendants are entitled to a dismissal judgment as a matter of law.

The Defendants hereby request the Court enter a judgment dismissing all claims under Fed.R.Civ.P 56.

Dated this __29th__ Day of July, 2010 at Woodinville, WA



Robin Cohen

Robin Kletke

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CERTIFICATE OF SERVICE

We, Robin Kletke and Robin Cohen, hereby certify that on July _29th____, 2010, we filed with the Clerk of the Court via CM/ECF the foregoing DEFENDANT'S MOTION FOR SUMMARY JUDGMENT. Said CM/ECF filing will send notifications of this filing to the following:

Gregory Cavagnaro
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1400 112th Avenue SE #100
Bellevue, WA 98004
Lead Attorney for Plaintiff

Mark Walters
1411 Fourth Avenue, Suite 75
Seattle, WA 98101
Attorney for Plaintiff

We certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this _29th____ Day of July, 2010 at Woodinville, WA



Robin Cohen Robin Kletke